

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Applications of:)	
)	
MICHAEL REED)	File Nos. 53348-CM-P-92, 53347-CM-P-92,
JOSEPH HEMENWAY)	and 53346-CM-P-92
JAMES LARSEN)	
)	
For Authority to Construct and Operate Stations in)	
the Private Operational-Fixed Service on the H)	
Group Channels at Greene, Illinois)	

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 2003

Released: July 10, 2003

By the Commission:

I. INTRODUCTION

1. We have before us a consolidated application for review filed by Michael Reed, Joseph Hemenway, and James Larsen (Petitioners) on July 12, 2000.¹ Petitioners seek review of a February 26, 1996 action by the former Mass Media Bureau dismissing the above-captioned applications.² For the reasons stated herein, we grant the application for review and reinstate the applications *nunc pro tunc*.

II. BACKGROUND

2. On October 21, 1991, Petitioners filed license applications for H Group channels in the private Operational-Fixed Service (OFS). A few days later, the Commission suspended the acceptance of such applications and reallocated the OFS H Group channels to the Multipoint Distribution Service.³ The *Freeze Order* specifically stated that the effective date of the freeze was September 26, 1991, the date of the *Freeze Order's* adoption.⁴ Consequently, on November 11, 1991, the Petitioners' license applications were dismissed as defective by the Chief of the Microwave Branch of the former Private Radio Bureau, for being filed after the effective date of the *Freeze Order*. Petitioners timely requested reconsideration

¹ Michael Reed, Joseph J. Hemenway, and James Larsen Consolidated Applications for Review (filed Jul. 12, 2000) (AFR).

² In 1995, the Private Radio Bureau was merged into the Wireless Telecommunications Bureau and responsibility for MDS applications was transferred to the Mass Media Bureau. Effective March 25, 2002, the Commission again transferred regulatory functions for the Multipoint Distribution Service/Multichannel Multipoint Distribution Service—this time from the Mass Media Bureau to the Wireless Telecommunications Bureau (Bureau). Radio Services Are Transferred From Mass-Media Bureau to Wireless Telecommunications Bureau, *Public Notice*, 17 FCC Rcd 5077 (2002). Accordingly, the Bureau's Public Safety and Private Wireless Division assumed all regulatory duties associated with these services effective March 25, 2002.

³ Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands, Gen. Docket No. 90-54, *Second Report and Order*, 6 FCC Rcd 6792 (adopted Sept. 26, 1991, rel. Oct. 25, 1991) (*Freeze Order*).

⁴ *Id.* at 6794 ¶ 9, n.9.

of that action, and on May 15, 1992, their requests were granted and the applications reinstated for “equitable reasons.”⁵ The applicants were directed to “resubmit” the applications along with the appropriate filing fee, no later than June 16, 1992.⁶

3. After timely resubmissions and almost four years later, on February 26, 1996, the Video Services Division (Division) of the former Mass Media Bureau (Bureau) dismissed the resubmitted applications for being filed on the wrong form.⁷ The Division indicated that the Commission’s *Freeze Order* required that after January 1, 1992 initial applications had to be filed on FCC Form 494,⁸ rather than on the previously authorized FCC Form 402.⁹ Subsequently, on March 29, 1996, Petitioners timely filed petitions for reconsideration, arguing that their applications were wrongfully dismissed, reinstated, and then wrongfully dismissed again.¹⁰ More than four years later, the Division denied these petitions for reconsideration, finding the dismissal of the applications to be correct.¹¹ The instant consolidated application for review was then filed on July 12, 2000.

III. DISCUSSION

4. Petitioners argue that at the time the subject applications were originally filed, FCC Form 402 was the correct form.¹² Consequently, they believe that the Bureau was wrong to dismiss them for not being filed on the new FCC Form 494.¹³ They believe that in this manner, they were treated differently than similarly situated applicants.

5. We believe that the instant case is similar to *In the Matter of Application of Steven S. Bosshard D/B/A Bosshard Radio Services*.¹⁴ In that case, the Licensing and Technical Analysis Branch (Branch), Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, dismissed the subject application on the basis that it was inconsistent with a particular 47 C.F.R. Part 90 Rule provision, and did not include a waiver request.¹⁵ Bosshard then filed a request for reconsideration of the Branch’s decision and requested a waiver of the relevant rule provision. Subsequently, the Branch granted him a waiver and reinstated his application for further processing.¹⁶ Seven months later,

⁵ Letter from Michael B. Hayden, Chief, Microwave Branch, Private Radio Bureau, Federal Communications Commission, to Joseph J. Hemenway, dated May 15, 1992; Letter from Michael B. Hayden, Chief, Microwave Branch, Private Radio Bureau, Federal Communications Commission, to James D. Larson, dated May 15, 1992; and Letter from Michael B. Hayden, Chief, Microwave Branch, Private Radio Bureau, Federal Communications Commission, to Michael F. Reed, dated May 15, 1992 (collectively, *Reinstatement Letters*).

⁶ *Id.*

⁷ See, e.g., Letter from Nazifa Naim, MMDS Section, Video Services Division, Mass Media Bureau, Federal Communications Commission to Michael F. Reed (dated Feb. 26, 1996).

⁸ See *Freeze Order*, Appendix D.

⁹ See, e.g., note 7, *supra*.

¹⁰ See Joseph J. Hemenway Petition for Reconsideration, filed March 29, 1996; Michael F. Reed Petition for Reconsideration, filed March 29, 1996; and James D. Larsen Petition for Reconsideration (filed Mar. 29, 1996).

¹¹ See, e.g., Letter from Charles E. Dziedzic, Assistant Chief, Video Services Division, Mass Media Bureau, Federal Communications Commission to Joseph J. Hemenway (dated Jun. 13, 2000).

¹² AFR at 5.

¹³ *Id.*

¹⁴ Application of Steven S. Bosshard D/B/A Bosshard Radio Services; Assignment and Modification of the License for Station WNKX-748, Temple, Texas, *Memorandum Opinion and Order* 14 FCC Rcd 20586 (1999).

¹⁵ *Bosshard*, 14 FCC Rcd at 2058.

¹⁶ *Id.*

however, the Branch denied Bosshard's reconsideration petition and waiver request, and dismissed the associated application.¹⁷ The Commission held that because thirty days had passed between (a) the date when the Branch granted him a waiver and reinstated his application, and (b) the date when the Branch dismissed the application, Section 1.113(a) of the Commission's Rules had been violated.¹⁸ Section 1.113(a) provides that a person, panel or board action pursuant to delegated authority has thirty days to modify or set aside its decision on its own motion.¹⁹

6. Similarly, in the instant case, we believe that the Bureau violated Section 1.113(a) of the Commission Rules by taking an action almost four years after the former Private Radio Bureau's May 15, 1992 reinstatement decision that in essence conflicted with the substance of such decision.²⁰ While the applications were timely resubmitted in accordance with the reinstatement decision,²¹ on February 26, 1996 the former Mass Media Bureau in essence modified and set aside the earlier Private Radio Bureau decision, the basis of which rested on "equitable reason[ing]" and the intention to "reinstate" the applications.²² This modification and set aside was accomplished by the Bureau's dismissal of the applications on the lone, technical basis that the applicants should have reformatted their resubmissions using a Commission form that was begun to be used subsequent to the filing of their initial applications in the previous year. We believe that the basis of the Bureau's decision conflicts with the basis of the former Private Radio Bureau's earlier decision. We also believe that the Mass Media Bureau's decision came too late to comply with Section 1.113(a).

7. Moreover, we believe that the basis for the Bureau's decision was at odds with the spirit of the former Private Radio Bureau decision, particularly given that such decision did not expressly state that the applications were to be resubmitted using a different form. Specifically, in light of the "equitable reasons to reinstate" and "resubmit" the subject applications,²³ in addition to the lack of clear notice by the Private Radio Bureau as to how the applicants must comply with May 12, 1992 decision,²⁴ the Mass Media Bureau's dismissal of the applications was erroneous.²⁵ Nothing in the *Freeze Order* or in the *Reinstatement Letters* placed the Petitioners on notice that they were required to resubmit their applications on FCC Form 494. While the *Freeze Order* required applicants filing after January 2, 1992 to file on FCC Form 494, the *Freeze Order* did not address applications filed during the freeze period that were later reinstated.²⁶ The United States Court of Appeals for the District of Columbia has stated, "[w]hen the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for

¹⁷ *Id.*

¹⁸ *Id.* citing 47 C.F.R. § 1.113(a).

¹⁹ 47 C.F.R. § 1.113(a). In another case involving Section 1.113(a), the Commission held that the Branch is not authorized to rescind a decision regarding applications for station modification, after the Section 1.113(a) thirty-day period had elapsed. See County of San Mateo, California Applications to Modify Public Safety Land Mobile Radio Station WIG278, *Order on Review and Reconsideration*, 16 FCC Rcd 4291 (2001).

²⁰ See *Reinstatement Letters*, note 5 *supra*. We do not here address the question of whether the former Private Radio Bureau had authority to reinstate the subject applications, we will not revisit the issue because the reinstatement action became final on June 24, 1992, 40 days after the date of the *Reinstatement Letters*. 47 C.F.R. § 1.117.

²¹ See *id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Freeze Order*, 6 FCC Rcd at 6811.

consideration.”²⁷ In this case, we conclude that Petitioners were not given adequate notice that their applications had to be refiled on FCC Form 494.²⁸

IV. CONCLUSION AND ORDERING CLAUSES

8. Based on the circumstances presented here, we overturn the dismissal of the subject applications by the Mass Media Bureau and grant the instant application for review.

9. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission’s Rules, 47 C.F.R. § 1.115, the Consolidated Application for Review filed by Michael Reed, Joseph Hemenway, and James Larsen on July 12, 2000, IS GRANTED.

10. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), that, no later than July 31, 2003, Petitioners may refile applications (using either copies of the original applications or new applications on currently authorized forms) for File Nos. 53346-CM-P-92, 53347-CM-P-92, and 53348-CM-P-92, in which case such files will be REINSTATED AND REFERRED to the Wireless Telecommunications Bureau, Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch for further processing consistent with this *Memorandum Opinion and Order*.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁷ *Salzer v. FCC*, 778 F.2d 869, 874 (D.C. Cir. 1985), *citing* *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d at 404. *Salzer* involved, in part, applications filed with the Commission to construct and operate a low power television station. The applicants were rejected by the Commission for not satisfying its specific acceptability criteria for such applications. *Salzer* at 871-73. The court indicated that the less forgiving the acceptability criteria, the greater the Commission’s obligation is to be explicit about any prerequisites for consideration. *Id.* at 875. Since the Commission had failed to provide adequate notice as to how certain information should be filed with the agency, the *Salzer* court held that the Commission was not entitled to reject the applications on the ground that they failed to meet these informational requirements. *Id.* The court vacated the underlying Commission order dismissing these applications, and remanded for the applications’ reinstatement. *Id.* See also *Bamford v. FCC*, 175 U.S. App. D.C. 250, 535 F.2d 78, 82 (D.C. Cir.) (“elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected”), *cert. denied*, 429 U.S. 895, 97 S.Ct. 255, 50 L. Ed. 2d 178 (1976).

²⁸ Petitioners also request that the Commission return the filing fee submitted with the resubmitted applications. Pursuant to 47 C.F. R. §§ 1.1113, 0.231, however, the refund request should be directed to the Managing Director. As a result, we will not address such request in the context of this decision. Given our decision herein we are not clear as to whether the Petitioners are interested in pursuing such relief. If so, such relief should be requested in accordance with the requirements set forth in 47 C.F.R. § 1.1113.